

No. 48720-9-II

Court of Appeals, Div. II,
of the State of Washington

State of Washington,

Respondent,

v.

Carissa D. Cannon,

Appellant.

Reply Brief of Appellant

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1. Introduction

The trial court violated Cannon's constitutional right to confront witnesses when it excluded evidence of details of the plea agreement entered into by codefendant Samuel Jackson. The full text of the plea agreement reveals the great pressure Jackson was under to please the State by testifying in a manner that would lead to Cannon's conviction. The error was not harmless. If Jackson's testimony had not been believed, the remaining evidence—Ludwin Borgen's testimony—was not credible and would not necessarily lead to a finding of guilt.

At sentencing, the trial court imposed discretionary legal financial obligations without any inquiry into Cannon's present or future ability to pay. The State's argument to the contrary is not supported by the record.

Cannon asks the Court to reverse her conviction and remand for a new trial. In the alternative, the Court should reverse the LFOs and remand for a proper inquiry into Cannon's ability to pay.

2. Reply Argument

2.1 The trial court violated Cannon's constitutional right to confront the witnesses against her when it excluded evidence of details of Jackson's plea agreement.

The key issue at trial was whether Ludwin Borgen's story about Cannon's participation in an armed robbery should be believed. The State relied heavily on the testimony of codefendant Samuel Jackson to corroborate Borgen's story. *E.g.*, CP 44-45; 5 RP 495-96. However, Jackson's plea agreement gave him a significant incentive to make sure his testimony matched Borgen's, in order to please the State and obtain the reduced sentence he bargained for. As a result of the trial court's exclusion of the details of the plea agreement, the jury was unable to fully judge Jackson's credibility.

Cannon's opening brief argued that, under *State v. Farnsworth*, 185 Wn.2d 768, 374 P.3d 1152 (2016), exclusion of details of Jackson's plea agreement violated Cannon's Sixth Amendment confrontation rights. Brief of Appellant, at 11-14. Without being able to inquire into certain details or to admit the agreement itself into evidence, Cannon was deprived of the ability to show the specific reasons why Jackson's testimony should not have been believed.

The State concedes that Cannon has raised a manifest constitutional error, reviewable under RAP 2.5(a)(3). Brief of

Respondent at 6 n. 2. Consequently, this Reply will focus on the merits of the issue.

The State relies almost exclusively on *State v. Ish*, 170 Wn.2d 189, 241 P.3d 389 (2010) to argue that the trial court's decision was correct under that case. However, the rule set forth in *Ish* has been replaced by the more recent, contradictory *Farnsworth* holding. Where *Ish* required exclusion of any language in the written agreement "that is not relevant to the defendant's impeachment evidence or tends to vouch for the witness's testimony," *Ish*, 170 Wn.2d at 199, *Farnsworth* requires, instead, that exclusion of **any details** of the agreement—or exclusion of the agreement itself—is a violation of a defendant's confrontation rights. *Farnsworth*, 185 Wn.2d at 794. The more recent case controls. Those portions of *Ish* that prohibit the State from introducing certain details of a plea agreement unless the defendant first opens the door are probably still good law. But to the extent *Ish* restricts the discussion of certain terms or the admissibility of the agreement itself (*see, e.g., Ish*, 170 Wn.2d at 198-99), it has been overruled by *Farnsworth*.

A criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby

to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.

Farnsworth, 185 Wn.2d at 794. Cannon’s counsel was not free to engage in appropriate cross-examination of Jackson. His hands were tied by the trial court’s application of *Ish*. He could not challenge Jackson’s credibility without opening the door to the “polygraph” and “testify truthfully” terms to be discussed, without context and without the ability to explore the text and details of the entire agreement.

The right of cross examination allows more than the asking of general questions concerning bias; it guarantees an opportunity to show specific reasons why a codefendant witness testifying pursuant to a plea bargain might be biased in a particular case. Such cross examination is the price the State must pay for admission of a codefendant’s testimony to that plea. **The jury needs to have full information about the witness’s guilty plea** in order to intelligently evaluate his testimony about the crimes allegedly committed with the defendant.

Farnsworth, 185 Wn.2d at 795 (emphasis added). “With a cooperating codefendant witness’s plea agreement, the devil is in the details.” *Id.* at 790. Excluding the plea agreement with all its details violates a defendant’s right to cross-examine the witness. *Id.*

Here, the context is everything. Viewing the “polygraph” and “testify truthfully” terms in their context demonstrates the

heavy hand of the State in coercing Jackson's testimony. *See* CP 38-40. The State would be the sole judge of whether Jackson's testimony would be deemed truthful. *See Id.* If Jackson failed in any way to "cooperate fully" or provide testimony that was pleasing to the State, the State would not only hold him to the greater charges, but reserved the right to bring any additional charges that might fit. *Id.*

Six successive paragraphs emphasized repeatedly that Jackson must be "truthful" in every way at every stage of the case. CP 39. The fifth of these (¶ 7) emphasizes, "SAMUEL JACKSON III understands that the State will not tolerate deception from him." *Id.* The full text of the agreement leaves no question that Jackson must please the State if he is to obtain the benefit of the plea agreement.

The last of these paragraphs (¶ 8) provided the standard that Jackson must meet to obtain the benefit: "SAMUEL JACKSON III will take no action ... that adversely affects the State's case against State v. Carissa Cannon." *Id.* This is the message that Jackson would have received from this agreement: if he would testify consistently with Borgen's story implicating Cannon in the armed robbery, the State would accept his testimony as "truthful" and would give him the benefit of the bargain. Conversely, if he testified in a way that harmed the State's case against Cannon—truthfully or not—the State would

judge him untruthful or uncooperative and would refuse to give him the benefit of the bargain. Jackson knew what the State would want to hear because he knew Borgen's story from police reports and interview transcripts. *See* 3 RP 415-16.

Jackson's incentive to corroborate Borgen's story—true or not—was much greater than what was conveyed to the jury by the limited testimony admitted by the trial court. With full information, a reasonable jury could have considered, as a source of reasonable doubt, that Borgen had fabricated the story of Cannon's involvement in a robbery and that Jackson had corroborated Borgen's story in hopes of pleasing the State and reducing his prison term by some 15 years. Exclusion of the plea agreement greatly restricted Cannon's ability to cross examine Jackson.

The State argues that any error was harmless. Harmless error under the Confrontation Clause requires the Court to first assume that the damaging potential of the cross examination was fully realized. *Farnsworth*, 185 Wn.2d at 797. Under that assumption, the court then considers whether the untainted evidence was so overwhelming that it necessarily—beyond a reasonable doubt—leads to a finding of guilt. *State v. Fisher*, 185 Wn.2d 836, 847, 374 P.3d 1185 (2016).

The State argues that Instruction No. 5 renders the error harmless because it instructed the jury to carefully examine

Jackson's testimony. However, under the required assumption, this instruction has no effect. The Court must assume that the cross-examination was successful and the jury would not believe Jackson's testimony. An instruction to take care in examining Jackson's credibility makes no difference if we are already assuming the jury does not believe him.

The instruction also cannot cure the exclusion of relevant evidence that would have enabled the jury to more carefully examine Jackson's credibility.

The State argues that the untainted evidence included Borgen's testimony of Cannon's involvement and the police officers' testimony that they found items on Cannon's person that Borgen claimed belonged to him. This evidence is not so overwhelming that it necessarily leads to a finding of guilt.

Borgen's testimony, without corroboration from Jackson, was not credible. Borgen had trouble remembering details, his observational accuracy was suspect, and he had significant motivations to have lied to police about what happened that night. He did not want to be caught with the drugs that he and "Aliyah" had purchased, when he was already facing charges for possession and DUI. 3 RP 284-85, 364-65. He lied to the officers when he said he had not taken any drugs that night. 3 RP 321. He may have lied about the robbery as well.

The items found on Cannon's person after she was found waiting in Borgen's car were only connected with Borgen because he told the police they were his. The officers had no personal knowledge connecting Cannon to the alleged robbery. Assuming Jackson's testimony would not be believed, only Borgen could connect Cannon with the alleged robbery, and Borgen was not credible. The evidence was not so overwhelming that it necessarily leads to a finding of guilt. The error was not harmless, and this Court should reverse the conviction.

2.2 The trial court erred in imposing discretionary LFOs without first inquiring into Cannon's present and future ability to pay.

Cannon's opening brief argued that the trial court's conclusory, boilerplate order imposing discretionary LFOs was inadequate under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), requiring remand for a proper, individualized inquiry into Cannon's present and future ability to pay.

The State makes a feeble attempt to argue that the trial court made an individualized inquiry. The State does not appear to understand what those words mean. An "individualized inquiry" requires the trial court to ask the defendant questions that will enable the court to assess the defendant's unique, individual, financial situation. The trial court must inquire, at a minimum, about the defendant's financial resources, debts,

regular expenses, family circumstances, educational and employment background, and likelihood of obtaining gainful employment after release.

Here, the full extent of the trial court's inquiry was as follows:

The Court: So it's just, I don't know anything about you. You didn't testify. So all I know is that you have a whole bunch of convictions here in Washington. What brought you to Washington?

The Defendant: My mom married a guy in the military at McChord.

The Court: Did you go to high school here?

The Defendant: No.

Mr. MacFie: She got a GED at the age of 16. She was going to school in Texas, moved up at the age of 21, if I recall correctly, up here with her mother, and she's been here for ten years.

5 RP 554-55. From this meager information, the trial court concluded, "She is a young woman. She has earning potential when she does get out." 5 RP 556. The trial court made no further inquiry into any of the individual circumstances that would enable the trial court to determine if Cannon would have the ability to pay discretionary LFOs. *Blazina* requires much more. This Court should reverse and remand for a proper inquiry.

3. Conclusion

Exclusion of details of Jackson's plea agreement violated Cannon's confrontation rights. This Court should remand for a new trial. In the alternative, this Court should remand for resentencing with proper consideration of Cannon's ability to pay LFOs.

Respectfully submitted this 23th day of November, 2016.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on November 22, 2016, I caused the original of the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

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DATED this 18th day of July, 2016.

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